In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 663

JOHN A. SNYDER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

Article 58 of Regulations 74 provides that when shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the gain or loss on such sale shall be computed by charging the stock sold against the earliest purchases of such stock.

The petitioner in this case during 1928 and prior years purchased stock through a broker on mar-

gin. In 1928 he sold through the broker a part of such stock. In computing the petitioner's gain on such sale, the Commissioner held that the marginal sales were not identifiable. He accordingly applied the above regulation and matched the sales against the earliest purchases of stock.

The petitioner intended to sell the shares last acquired by him, and the principal question is whether this intention was a sufficient identification of the stock sold so as to take this case out of the regulation. The petitioner also contends that the regulation, if applicable, is unconstitutional. The Circuit Court of Appeals upheld the regulation and held further that mere intention to sell the latest acquired stock was not an identification of the stock sold.

We believe the conclusion reached by the court is right, but feel that much of the court's reasoning is erroneous, particularly when the court attempts to distinguish between shares of stock and certificates of stock, holding that the former are capable of identification even though the identity of the latter be lost.

The case here is practically identical with the case of *Guy T. Helvering, Commissioner of Internal Revenue,* v. *James L. Rankin, Executor of the Estate of Richard B. Turner, deceased,* now pending on the Government's petition for certiorari, No. 582, present term. The *Rankin case* and the

instant case were both decided by the court below on the same day, and in the one opinion the court incorporated by reference much of its reasoning contained in the other (73 F. (2d) 5, 9). The only difference between the two cases is that in the *Rankin case* the taxpayer communicated his intention to dispose of his latest acquired stock to his broker, whereas in this case no such communication was made. The court gave effect to this difference, holding in the *Rankin case* that such communication amounted to identification, but holding in the instant case that the uncommunicated intention did not constitute identification. We submit the distinction made by the court is unsound and that the two cases should have been decided alike (see the *Rankin* petition, pp. 8–9).

The petitioner in the instant case raises several issues which are not present in the *Rankin case*. We feel there is no merit whatever to these contentions. But basically both cases involve the validity of the regulations and its application to substantially the same facts. Because of the similarity in the cases, and because of the general importance of these questions, we do not feel warranted in opposing the present petition.

Should the Court deny the Government's petition in the *Rankin* case, the petition should be denied in this case. If both petitions are granted,

we respectfully suggest that both cases be set for hearing on the same day.

Respectfully submitted.

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